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Utah v. Arnold J. Swenson : Brief of Appellee

Utah Supreme Court

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BRIEF

SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff and Appellant, v. ARNOLD J. SWENSON, Defendant and Appellee.	BRIEF OF APPELLEE Case No. ~~91026~~ 910026 Rule 29 Priority No. 11

Appeal from an Order of Dismissal
by the Honorable J. Dennis Frederick
Third Judicial District Court in and for Salt Lake County, Utah

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STATEMENT OF JURISDICTION

Appellee does not dispute the statement of jurisdiction set forth on page 1 of the Brief of Appellant herein.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Appellee respectfully suggests that the statement of issues presented for review found in the State's opening brief is, like the statutues at issue herein, unnecessarily convoluted and complex. Appellee suggests that the following statement of issues is simpler and less redundant.

ISSUE I: ARE THE TERMS "ISOLATED TRANSACTION", "UNDERWRITER" AND "PUBLIC OFFERING" USED IN SECTION 61-1-14(2) TO DEFINE TRANSACTIONS EXEMPT FROM CERTAIN REGISTRATION REQUIREMENTS OF THE UTAH UNIFORM SECURITIES ACT UNCONSTITUTIONALLY VAGUE?

ISSUE II: ARE CRIMINAL PROSECUTIONS UNDER SECTION 61-1-3(1) BARRED BECAUSE THE DEPENDENT RELATIONSHIP BETWEEN SECTION 61-1-14(2) WHICH IS UNCONSTITUTIONALLY VAGUE, AND SECTION 61-1-13(2) WHICH DEFINES THE TERM "AGENT", RENDERS THE APPLICABLE DEFINITION OF "AGENT" UNCONSTITUTIONALLY VAGUE.

ISSUE III: IN THE CONTEXT OF THIS CASE DID THE TRIAL COURT ERR BY APPLYING THE CLEAR LANGUAGE OF SECTION 61-1-14.5 AND RULING THAT THE BURDEN OF PROVING AN EXEMPTION TO THE DIFINITION OF "AGENT' RESTED WITH THE DEFENDANT?

Appellee concedes that City of Logan v. Utah Power & Light Co., 796 P.2d 697, 699 (Utah 1990), and cases cited therein sets forth the appropriate standard by which the questions raised by the State's appeal herein should be reviewed.

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

In addition to the constitutional provisions and statutes

cited in the State's opening brief on appeal, appellee suggests that the following additional provisions of the Utah Code are relevant to a proper resolution of the issues raised in this appeal.

> **76-1-501. Presumption of innocense - "Element of the offense" defined.**
> (1) A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In the absence of such proof, the defendant shall be acquitted.
>
> **76-1-502. Negating defense by allegation or proof - When required.**
> Section 76-1-501 does not require negating a defense:
> (1) By allegation in an information, indictment, or other charge; or
> (2) By proof, unless:
> (a) The defense is in issue in the case as a result of evidence presented at trial, either by the prosecution or the defense; or
> (b) The defense is an affirmative defense and the defendant has presented evidence of such affirmative defense.
>
> **Section 76-1-504. Affirmative defense presented by defendant.**
> Evidence of an affirmative defense as defined by this code or other statutes shall be presented by the defendant.

SUMMARY OF APPELLEE'S ARGUMENTS

Appellant believes that the State, in stating the issues it believes to be before the Court in this case, has essentially asked the same question three times in issues 2, 3 and 4. The fact that it has deemed it necessary to do so supports Appellee's contention that the statutory scheme requiring registration of "agents" embodied in the Utah Uniform Securities Act is awkward, confusing and unconstitutionally vague. The following

arguments lend further support to that proposition.

First, Section 61-1-13(2) requires that in order to be found to have acted as an "agent" a person must have "represent(ed) a broker/dealer or issuer", and have acted "in effecting or attempting to effect purchases or sales of securities". However, the section goes on to state that a person may be deemed not to be acting as an agent even if he meets the foregoing conditions if (1) he represents an issuer (rather than a broker-dealer), and (2) receives no commission or other remuneration and, (3) [for purposes of this case] effects transactions exempted by Section 61-1-14(2).

Three kinds of transactions exempted by that section are as follows:

> Section 61-1-14(2)(a), isolated transactions whether effected through a broker/dealer or not;
>
> Section 61-1-14(2)(d), transactions between the issuer or other person on whose behalf the offering is made and an underwriter or among underwriters; and
>
> Section 61-1-14(2)(n), transactions not involving any "public offering".

The problem is that The Utah Uniform Securities Act does not define the terms "isolated transaction", "underwriter" or "public offering"; and the technical meaning of the terms is not self-evident. Under Section 61-1-13(2) one must understand the meaning of those terms in order to ascertain what an "agent" is not; for without knowing that, one cannot determine what an agent is. Thus, a reasonable man who desires to comply with the law

cannot, by reading Sections 61-1-13(2) and the targeted provisions of Section 61-1-14(2) determine when he will be deemed to be acting as an agent under the Utah Uniform Securities Act. Therefore, under prevailing case authority, Section 61-1-13(2) is unconstitutionally vague.

Second, Section 61-1-3(1) makes it unlawful for any person to transact business in Utah as either a broker/dealer or an "agent" unless the person is licensed under the Utah Uniform Securities Act; and Section 61-1-21 provides that a willful violation of Section 61-1-3(1) of that Act is a felony. Because the section of the act which defines "agent" for purposes of Section 61-1-3(1) is unconstitutionally vague, Section 61-1-3(1) is itself, equally vague. That being the case, criminal prosecution for violation of Section 61-1-3(1) initiated pursuant to the authority of Section 61-1-21 is constitutionally barred.

Third, Appellee will address Appellant's argument that the trial court erred by ruling that according to its terms, Section 61-1-14.5 placed the "burden of proving" that his conduct entitled him to an exception from the definition of agent found in Section 61-1-13(2) squarely upon Arnold Swenson. Appellee will contend that though the State's admission that under Utah law the State must prove the unavailability of exemptions from the agent registration provision of Section 61-1-3(1) in criminal prosecutions for violating the section is constitutionally correct, the trial court in this case did not err by applying the contrary provision of Section 61-1-14.5 because (1) neither this Court nor

the Utah Court of Appeals has ever held that Section 61-1-14.5 should not be applied according to its terms in criminal cases; (2) imposition of the procedural scheme necessary to effect the State's proposal is a matter for the legislature and was not a matter that could have been dealt with by the District Court.

As a corrolary to the foregoing proposition, Appellee will argue that even if this Court should adopt the palliative measure urged upon it by the State, any judicial construction necessary to render the applicable statutes constitutional will have been pronounced after the acts for which Appellant was charged were committed. No such construction should be retroactively applied to permit this case to be tried.

ARGUMENT

I

THE DEFINITION OF "AGENT" FOUND IN SECTION 61-1-13(2) OF THE UTAH UNIFORM SECURITIES ACT IS UNCONSTITUTIONAL BECAUSE THE ACT DOES NOT DEFINE TERMS USED IN SECTIONS ESTABLISHING EXCEPTIONS FROM THE DEFINITION FOUND THEREIN.

In order to establish that a person is an "agent" under the definition found in Section 61-1-13(2) of the Utah Uniform Securities Act the State must demonstrate that (1) the accused person is "any individual other than a broker/dealer who represents a broker/dealer or issuer - (2) in effecting or attempting to effect purchases or sales of securities. The section then goes on to state circumstances in which an individual meeting those criteria will, nevertheless, not be deemed to be acting as an agent, to-wit; cases in which the person (a) "represents an issuer

[but not an underwriter] and who (b) receives no commission or other remuneration and [for purposes of this case] (c) effects transactions exempted by subsection 61-1-14(2).

Amongst the eighteen kinds of transactions exempted under Section 61-1-14(2) are "any isolated transaction, whether effected through a broker/dealer or not" (Section 61-1-14(2)(a)); "any transaction between the issuer or other person on whose behalf the offering is made and an underwriter, or among underwriters" (Section 61-1-14(2)(d)); and "any transaction not involving a public offering" (Section 61-1-14(2)(n)).

The problem is that none of the underlined terms are defined by the Utah Uniform Securities Act. Appellee contends that this failure renders the definition of agent found in Section 61-1-13(2) unconstitutional on its face both under the Fourteenth Amendment to the United States Constitution, and Article I Section 7 of the Constitution of Utah.

The Appellant has correctly cited state and federal authority for the proposition that "... a criminal violation should be described with sufficient certainty so that persons of ordinary intelligence, desiring to obey the law, may know how to govern themselves in conformity with it". State v. Owens, 638 P.2d 1182, 1183 (Utah 1981); citing Greaves v. State, 528 P.2d 805 (Utah 1974), Grayned v. City of Rockford, 408 U.S. 104 (33 L. Ed. 2d 222 (1972), 92 Sup. Ct. 2294, and U.S. v. Harriss, 347 U.S. 612, 98 L. Ed. 2d 989, 74 Sup. Ct. 808 (1954). Appellant is also correct when it argues that under Kent Club v. Toronto, 305 P.2d 870 (Utah,

1957) this Court should not declare any statute unconstitutional until it has attempted, without success, to construe the statute so as to give effect to its language in a manner which will meet constitutional muster by reasonably advising the citizens of their legal obligations thereunder.

Having correctly gotten this far, the State then cites a number of cases which are not in point in an attempt to demonstrate that the provisions of the Utah Uniform Securities Act which are at issue in this case are not unconstitutional. For instance, Favor v. State, 389 S. 2d 556 (Ala. Cr. App., 1980) is not in point because the issue in that case was the apparent conflict between a provision defining the penalties for willful violations of the Alabama Securities Act and a different requirement which provided that scienter need not be alleged or proved in prosecutions involving the sale of unregistered securities or in the failure to register as a dealer or salesman. The court merely held that those two sections were not in conflict; that though the state must prove scienter in fraud cases, it is not unconstitutional for the code to punish registration violations without any showing of mens rea except that the defendant knew what he was doing when he committed the prohibited act.

Similarly, Hewett v. State, 672 S.W. 2d 533 (Tex. App. 5 Dist., 1984) has little or nothing to do with the issues presented in this case. In that case, the appellant had been convicted of fraud for making misrepresentations of "material fact." On appeal, he argued that the term "material fact" was vague. In support of

his argument he cited a prior Texas case in which the appellate court had suggested that though the language of the statute which prohibited "omitt[ing] to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading" was saved from unconstitutional vagueness by the clarifying language found at the end of the sentence, the phrase "material fact", standing alone, might be unconstitutionally vague. However, in Hewett, the court ruled, in reliance on state and federal authorities to the effect that the construction of the applicable statute must be made in light of the facts of the case at hand and that since defendant Hewett had misrepresented the company's assets by 33 million dollars and omitted to mention that he had three prior theft convictions and a probation revocation which were on appeal, the questioned phrase was fully sufficient to make it clear to him that misrepresentations and omissions of that calibre were "material". In its holding, the court cited Farmer v. State, 540 S.W. 2d 721 (Texas Criminal Appeals 1976) for the proposition that all that is required for a statute to meet constitutional muster is that it be understandable when measured by "common understanding and practice".

So far as undersigned counsel can tell, State v. Martin, 187 N.W. 2d 576 (S.D. 1971) is mis-cited for any proposition involving an agent registration requirement because, though the South Dakota agent registration provision is quoted as part of the statute under which the defendant was prosecuted, the opinion of

the court says nothing at all about that provision but deals exclusively with the appellant's conviction under the anti-fraud prohibitions of the statute. The language quoted at the bottom of page 26 of appellant's brief clearly relates only to the antifraud prohibition of the statute in question, and is a quote from U.S. v. Lilley, 291 F. Supp. 989 (D.C.S.D. Texas 1968) which was a case decided under under the anti-fraud provisions of Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 promulgated thereunder (See 15 U.S.C. Section 78(j)(b) and 17 C.F.R. Section 240.10b-5), and in which the deciding court held that the "no knowledge" exception to the penalty provision of Section 10(b) could not save the appellants from prison sentences because those defendants had been charged with knowledge of the statutes and regulations governing the sales of securities. Both Martin and Lilley are absolutely inapposite.

In point of fact, Appellant has not cited so much as a single case which has ruled on the constitutionality of any group of statutory provisions which are substantially similar to the convoluted regulatory scheme created by the relationship between Sections 61-1-3(1), 61-1-13(2), 61-1-14(2)(a), (d), and (n), and 61-1-14.5 of the Utah code. That is not to say, however, that such case authority is not available. In People v. Dempster, 242 N.W. 2d 381 (Mich. 1976) the court dealt with an appeal from a conviction under the Michigan Uniform Securities Act in which defendant, convicted of distributive and anti-fraud violations of the Michigan securities act, appealed claiming that the "open ended

trust account" instruments she had sold were "commercial paper" exempt from registration under the act. Appellant argued that because the phrase "commercial paper" was not defined in the Michigan Securities Act, but was defined by the Michigan Uniform Commercial Code in a manner which fairly described the instruments she had sold, the court was required to read the UCC definition into the Securities Act, declare that the instruments she had sold were exempt from registration, and reverse her conviction on the registration counts. The Michigan Supreme Court refused to adopt this argument, holding that to read the UCC's expansive definition of commercial paper into the Securities Act would be inconsistent with the Securities Act's purpose to "protect against swindles". (242 N.W.2d at 385.) The court then went on to address Appellant's second argument that whether or not she won or lost on her affirmative claim that the instruments she sold were exempt from registration, the "commercial paper" exemption found in the Michigan Securities Act was unconstitutional because the Act did not define the term. In dealing with this claim, the court relied upon the following exemplary statement of the constitutional requirements of specificity:

> A criminal statute must be "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties". Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888 (1939). "(A)mbiguity concerning the ambit of criminal statutes should be resolved in favor

> of lenity." Rewis v. U.S., 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971).
>
> Exemptions and provisos within a criminal statute must be defined with the same specificity as the prohibitive language of the statute. Cline v. Frink Dairy Co., 274 U.S. 445, 47 S.Ct. 681, 71 L.Ed. 1146 (1927).

Applying these standards, the court had no difficulty holding, with little factual analysis, that the term "commercial paper" standing by itself was not sufficiently definite to sustain a criminal conviction. 242 N.W.2d at 389.

Appellee commends the principles relied upon by the Michigan court to this court in dealing with the terms "isolated transaction", "underwriter" and "public offering", and suggests that under those principles, none of those terms passes constitutional muster.

Like the term "commercial paper" dealt with in Dempster, none of those terms are defined by the Utah Uniform Securities Act. The terms "underwriter" and "public offering" are borrowed from Sections 4(1) and 4(2), respectively, of the Securities Act of 1933 (15 U.S.C. Section 77(d)(1) and 77(d)(2); and "underwriter" is extensively defined by Section 2(11) of the act, 15 U.S.C. Section 77(b)(11). Appellant argues that because Section 61-1-27 U.C.A. which requires that the Utah Uniform Securities Act is to be construed "to coordinate the interpretation and administration of this chapter with the related federal regulation", this Court should read the definition of the term "underwriter" found in the Securities Act of 1933 into the Utah Uniform Securities Act wholesale. This notion cannot be sustained under the rules of

statutory construction for at least three reasons. First, Section 2(11) of the federal act had already been the law for more than thirty years when the Utah act was first enacted. If the Utah Legislature had wanted to adopt that definition it could easily have done so. The fact that it chose not to do so stands as strong evidence that the Utah Legislature intended to affirmatively reject the Securities Act definition of "underwriter" as the definition to be applied in construing the Utah act. Second, the term "underwriter" is used with the terms "issuer" and "dealer" (both defined in the Utah act) in defining a broad exemption from registration of securities. See Section 4(1) of the Securities Act of 1933, 15 U.S.C. Section 77(d)(1). The fact that this whole category of exemptions has been rejected in the Utah act suggests that our legislature may not have been enthralled with the convoluted definition of "underwriter" found in the federal act. Finally, if the Legislature had intended to adopt the federal definition of "underwriter" or, for that matter, "public offering", it must have been reminded of that option when it adopted the general language of Section 61-1-27. That it did not utilize that opportunity makes it clear that it did not intend that result.

The term "public offering" is a term of art in securities parlance which is not defined by either the Utah Securities Act or the federal Securities Act of 1933. However, the meaning of the term as employed in the federal act has been enlightened by a long series of rules promulgated by the Securities and Exchange Commission under Section 19(a) of the 1933 Act. See, e.g., 17

C.F.R. Sections 230.146 (now repealed), 230.152, 230.285, 231.4552, 230.5121. The term "isolated transaction" is not used in the federal securities acts, and is not defined in the Utah act. The Utah Securities Division has not, despite the example set by the SEC, adopted any rule or regulation pursuant to Section 61-1-24 or otherwise in which it has defined or explained the meanings of either of those terms as they are employed in the act. Without more than is found in readily available interpretive sources, each of these terms lacks sufficient definition to "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden". See Coates v. Cincinatti, 402 U.S. 611 (1971), Papachristou v. Jacksonville, 405 U.S. 156 (1972) and Kolender v. Lawson, 461 U.S. 352 (1983).

II.

CRIMINAL PROSECUTIONS UNDER SECTION 61-1-3(1) ARE BARRED BECAUSE THE DEPENDENT RELATIONAHIP BETWEEN SECTION 61-1-14(2) WHICH IS UNCONSTITUTIONALLY VAGUE, AND SECTION 61-1-13(2) WHICH DEFINES THE TERM "AGENT", RENDERS THE APPLICABLE DEFINITION OF "AGENT UNCONSTITUTIONALLY VAGUE.

One need only read the language of Section 61-1-13(2) with care to see that unless one is able to determine that he is not an "agent" because, though he may have representated a broker-dealer or issuer in effecting a sale of securities, he may also have (1) represented an issuer, not a dealer, and (2) received no commission or remuneration, and (3) effected a transaction exempt under section 61-1-14(2)), one cannot ascertain whether his conduct brings him within the provision of Section 61-1-3(1) which

prohibits him from effecting certain transactions unless he is registered as an "agent" under [the Utah Uniform Securities Act]. Since, as has been domonstrated above, Section 61-1-14(2) fails to identify transactions which a person may effect without being deemed an agent with the required specificity, it is impossible for a person to reasonably ascertain when the transaction he intends to effect will bring him within the definition of that term. Hence, the dependent relationship between those two provisions renders both of them equally unconstitutional.

In Dempster, supra, the Michigan court relied on the wise rule gleaned from Cline v. Frank Dairy Co., also supra, to the effect that exceptions to criminal prohibitions must be defined with "the same specificity as the prohibitive language of the statute." Section 61-1-3(2) plainly prohibits acting as an "agent" unless one is registered under the Utah Uniform Securities Act. The language of this prohibitive section is crystal clear. However, as has been seen above, the language defining exceptions to the application of that rule is unconstitutionally vague. Application of the foregoing maxim makes it clear that the unconstitutionality of Sections 61-1-13 2) and 61-1-14(2)(a), (d) and (n), in turn, renders Section 61-1-3(2), which is dependent on them, likewise unconstitutional.

III.

IN THE CONTEXT OF THIS CASE THE TRIAL COURT DID NOT ERR BY APPLYING THE CLEAR LANGUAGE OF SECTION 61-1-14.5 AND RULING THAT THE BURDEN OF PROVING EXEMPTIONS TO THE DEFINITION OF "AGENT RESTED WITH THE DEFENDANT.

Both the form and substance of Section 61-1-14.5 are so

simplistic that there can be no doubt about the legislature's intention to vest the burden of proving that the transactions he effected brought him within the "exception" to the definition of "agent" squarely upon Arnold Swenson. Nevertheless, Appellant now concedes that this statute is wrong, and that the "...burden of disproving (if necessary) the existence of a Transactional Exemption, falls squarely upon the state in a criminal case." Appellant's Brief at page 15.

Unfortunately, the willingness of the executive branch of government to lay aside the enactments of our Legislature is not enough to cure the problems raised by the statutory provisions at issue in this case.

1. No prior judicial rulings. Neither this Court nor the Utah Court of Appeals has ever ruled that Section 61-1-14.5 is unconstitutional or otherwise invalid when applied to criminal prosecutions; and neither court has suggested that trial judges are at liberty to simply ignore it. On November 13, 1990, Section 61-1-14(2) was part of the law which Judge Frederick was sworn to uphold and apply. It cannot be error for him to have done so.

2. The impropriety of judicial amendment of applicable statutes. The fact that Section 61-1-14.5 stands upon the books unchanged is incontrovertible evidence that the Legislature has not yet recognized the error which the Attorney General now admits. The question is: "Who should fix it?" The State says this Court is at liberty to do it by the simple device of holding that rather than meaning what it plainly says, Section 61-1-14.5 makes

establishment of an exception from the definition of "agent" an "affirmative defenses" so that once a defendant has adduced some evidence to support his claim to exception, the burden of proving that the defendant's conduct did not entitle him to the claimed exception shifts back to the state.

In support of its claim, the State relies primarily upon State v. Tebbs, 786 P.2d 775 (Utah App. 1990) which involved the following language of Section 76-10-1801, U.C.A. which prohibits Communications Fraud.

> (7) It is an affirmative defense to prosecution under this section that the pretenses , representations, promises or material omissions made or omitted by the defendant were not made or omitted knowingly or with reckless disregard for the truth. (Emphasis added.)

Appellant's complaint in Tebbs, supra, was that Section 76-10-1801 shifted to defendant the burden of disproving an essential element of the crime, i.e. that of a culpable mental state. The Court of Appeals disagreed on the basis that (1) despite its literal language, the Legislature's intention when it enacted Section 76-10-1801(7) was not so much to establish an "affirmative defense" as it was to make it absolutely clear that proof beyond a reaonable doubt that the defendant's conduct was knowing or reckless is required for conviction of Communications Fraud; and (2) that even if the statute were to be construed to establish an "affirmative defense", that would not, under the affirmative defense cases cited in the opinion, shift to the defendant the burden of proving his defense. That would merely require defendant to produce "some evidence" of the defense. Once he had done so, the burden of

disproving the defense beyond a reasonable doubt would shift back to the State. Citing State v. Moritzsky, 771 P.2d 688 (Utah Ct. App. 19890, State v. Knoll, 712 P.2d 21 (1985) and State v. Wood, 648 P.2d 71, 82 n. 7 (Utah), cert denied, 459 U.S. 988 (1982).

If, like Section 76-10-1801(1), Section 61-1-14.5 provided that -

> [It is affirmative defense to prosecution under section 61-1-3(2) that defendant was not an agent within the meaning of Section 61-1-13(2) because, among other things, the transactions he effected or attempted to effect were exempt under Section 61-1-14(2).] -

then Tebbs would be authority for the proposition that the section is constitutional. However, the statute construed in Tebbs does not read like Section 61-1-14.5 for that section does not use plain language to shift the burden of proving a defense to the defendant in a criminal case. If we paraphrase Section 76-10-1801(7) which is construed in Tebbs so it reads like Section 61-1-14.5, the former section would read as follows:

> [(7) In any proceeding under this section, the burden of proving that the pretenses, representations, promises, or material omissions made or omitted by the defendant were not made or omitted knowingly or with a reckless disregard for the truth is upon the defendant.]

In dictum, the Tebbs Court correctly dealt with such a statute in the exact manner by which this Court should deal, once and for all, with Section 61-1-14.5.

> The crux of defendant's argument is that subsection (7) of Section 76-10-1801 shifts to defendant the burden of disproving an essential element of the crime, namely that of a culpable mental state. If true, this would violate the Due Process clauses of the United States and Utah Constitutions. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond

> a reasonable doubt of every fact necessary to constitute the crime with which he is charged. [Citations omitted.] ("A fundamental precept of our criminal law is that the State must prove all elements of a crime beyond a reasonable doubt." State v. Sorenson, 758 P.2d 466, 468-69 (Utah Ct.App. 1988).

From the State's perspective, the problem with Tebbs is that unlike the section at issue therein, Section 61-1-14.5 doesn't purport to establish any "affirmative defense." Thus, it is not sound direct authority for any issue directly raised by this appeal. It does not stand for the proposition (urged by the State) that this Court ought to rewrite the provisions of the Utah Uniform Securities Act which are at issue in this case. Appellee suspects that the State's inappropriate reliance on Tebbs may have been generated by the seductive manner in which the Court of Appeals wrote the words "affirmative defense" out of the statute for the purpose of one of the case's two holdings. That much liberty with the Legislature's intent might be permissible. However, Appellee suggests that writing the words "affirmative defense" into a section from which they are conspicuously absent as the provision was enacted by the Legislature would be conduct exceeding the Court's legitimate role in "construing" statutes.

This is so because affirmative defenses under Utah law are not created by the courts but by the Legislature. Relevant sections of the Utah Criminal Code are as follows:

> **76-1-501. Presumption of innocense - "Element of the offense" defined.**
> (1) A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In the absence of such proof, the defendant shall be acquitted.

76-1-502. Negating defense by allegation or proof - When required.

Section 76-1-501 does not require negating a defense:

(1) By allegation in an information, indictment, or other charge; or

(2) By proof, unless:

(a) The defense is in issue in the case as a result of evidence presented at trial, either by the prosecution or the defense; or

(b) The defense is an affirmative defense, and the defendant has presented evidence of such affirmative defense.

Section 76-1-504. Affirmative defense presented by defendant.

Evidence of an affirmative defense as defined by this code or other statutes shall be presented by the defendant. (All Emphasis added.)

If the legislature had intended the result the State now urges upon the Court, the last quoted section would read:

> **Evidence of an affirmative defense as defined by this code, other statutes, the Court of Appeals of Utah or the Utah Supreme Court shall be presented by the defendant.**

Of course, the section does not read that way - and this Court should not treat it as if it did.

Though uttered in response to a ruling of a Court of Appeals holding the federal government liable for certain negligent conduct in the face of a statute which did not impose liability, the Supreme Court, in U.S. v. James, 478 U.S. 597, 612, (1986) adopted the following language which contains good advice in the context of the instant case:

> As the facts in this case demonstrate, one can well understand why the Court of Appeals sought to find a principled way to hold the Government responsible for its concededly negligent conduct. But our role is to effectuate Congress' intent, and Congress rarely speaks more plainly than it has in the provision we apply here. If that provision is to be changed, it should be by the Congress and not by this Court. (Emphasis added.)

The Utah Legislature could not have spoken more plainly than it did in Section 61-1-14.5 when it placed the burden of proving exceptions to definitions in the Utah Uniform Securities Act on defendants and thus, excused the State from proving an element of certain criminal offenses enacted as part of the act. The State correctly concedes that the provision is unconstitutional. See In re Winship, 387 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970). The State argues, in essence, that this Court should remand the case to the District Court for trial in which the jury should be instructed that it may find Defendant guilty if it finds that :

> Defendant Arnold J. Swenson;
> 1. Willfully;
> 2. effected or attempted to effect purchases or sales of securities; and
> 3. Arnold J. Swenson was not registered at the time; and
> 4. Arnold J. Swenson represented an issuer, and did not receive any commission or other remuneration, directly or indirectly, for effecting or attempting to effect the transactions.
>
> If you find that Arnold Swenson effected or attempted to effect purchases or sales of securities and was not registered, but that (1) he represented an issuer and not a broker-dealer, and (2) did not receive any commission or other remuneration, indirectly or indirectly, so so doing, then he might, under certain circumstances depending upon the nature of the transactions he effected or attempted to effect, come within an exception to the definition of "agent, and therefore be deemed not to have acted as an "agent" in effecting or attempting to effect such sales or purhases of securities.
>
> Even though Utah Uniform Securities Act requires Swenson to prove that he is within an exception to the definition of agent, it would be impossible for him to do so because some of the terms used to define certain of the exceptions to the definition are not defined by the Act.
>
> Therefore, the Supreme Court of Utah has held

> that the State must disprove that Swenson is within an exception to the definition of "agent". Since the State cannot prove that he is not entitled to an exemption and any better than Swenson could prove that he is entitled to it, you must acquit the defendant if you find that (1) he represented an issuer and not a broker-dealer, and (2) that he received no commission or other remuneration for effecting the subject sales of securities.

Of course, Appellee realizes that the trial jury would not literally need to be instructed in detail about the reason for the rule it would be required to follow, but there is no escaping the fact that most of the substantive law embodied in a truthful explanation of the situation presented by this statutory quagmire would be judge-made law, fashioned of necessity as a result of a legislative error. It is also true that though the Court might finesse the burden of proof problem, it plainly can to nothing to solve the underlying difficulty posed by the Legislature's failure to have defined critical terms employed in Secton 61-1-14(2). A judicial solution could not remedy more than half the problem.

Appellee concedes that Courts have some discretion to construe statutes in a way which will preserve their constitutionality. However, the extent to which the State urges the Court to go to save these statutes goes far beyond mere "construction." For after having agreed with the State that the law cannot be constitutionally applied as written, the court is being called on to elect between a number of possible alternatives with implications affecting both the complicated regulatory scheme contained in the Utah Uniform Secutities Act and the carefully defined rules related to affirmative defenses and notice which are contained in the Utah Criminal Code. Where the changes required

are that radical, they should be made by the Legislature.

3. No saving interpretation of relevant provisions which this Court may now pronounce can be applied retroactively to further prosecution of Appellee. Judge Frederick dismissed this case in the District Court because certain provisions of the Securities Act are unconstitutional. The State wants this Court to construe those sections in a manner which would render them constitutional and then reverse Judge Frederick's judgment in the District Court on the basis that new judicial contruction. This tactic would be inappropriate.

In Grayned v. City of Rockford, 408 U.S. 104, 108, 33 L.Ed.2d 222, 92 S.Ct. 2294 (1972) the Supreme Court was required to construe an anti-picketing and anti-noise ordinance which had, between the date of appellant's conviction and the date the case was decided in the Supreme Court, been amended to delete the anti-picketing provisions. In a footnote, the Court held that it could not take into account the later amendment, but was required to rule on the statute in its form on the dates when appellant was arrested and convicted.

Even more in point is People v. Dempster, supra, in which the Michigan court dealt with a case in which the appellant had been convicted of failure to register securities which she claimed were exempt under the Michigan Securities Act. In dealing with the case on appeal the court held that the exemptive provision to which appellant claimed entitlement was vague on its face. However, the court fashioned a construction which ruled made the exemptive

language constitutional. It was nevertheless required to reverse the appellant's conviction based on the following reasoning:

> Thus, while the construction we have placed on the commercial paper exemption is valid for the future, "it may not be applied retroactively, any more than a legislative enactment may be, to impose criminal penalties for conduct committed at a time when it was not fairly stated to be criminal." Bouie v. City of Columbia, 412 U.S. 430, 93 S.Ct. 2199, 37 L.Ed.2d 52 (1973).
>
> As we recently stated in People v. Bloss, 394 Mich. 79, 228 N.W.2d 384, 385 (1975):
>
> > "We are persuaded that defendant's conviction cannot stand for the reason that at the time he did the act complained of this Court had not construed the **** statute *** to proscribe such conduct."

See also Woll v. Kelly, 297 N.W.2d 578 (Mich. 1979) where the court ruled that though statutory vagueness and overbreadth can sometimes be cured by judicial construction, the limiting construction must have been rendered prior to any conduct resulting in a criminal prosecution, citing Shuttlesworth v. Birmingham, 382 U.S. 87 (1965).

If, despite Appellee's arguments to the contrary, the Court should fashion a construction of the statutes at issue in the case which would render them constitional, the court would nevertheless be in the same position as was the Michigan court in Dempster and would be constrained under the reasoning set forth in that case and the others cited above, to affirm the judgment of the lower court herein.

4. Due process and sound judicial policy. There is a

final reason based in judicial policy and due process for the Court to affirm the judgment below.

The Attorney General is to be commended for his candid concession that Section 61-1-14.5 cannot constitutionally be applied to claims of exemption in criminal prosecutions under the Utah Uniform Securities act. However, it is important for the Court to take careful note of the fact that no such admirable concession was forthcoming from the Attorney General until his office was caught red-handed attempting to convict and perhaps imprison a citizen on the basis of an application of the very statute he now concedes cannot lawfully be applied. The evidence behind this assertion lies in the proposed jury instructions the State submitted to Judge Frederick in this case. Those instructions contain not a single word to suggest to either the trial court or the jury that the State had any obligation to disprove the availability of any exception to the definition of "agent" which Arnold Swenson might claim, or indeed, that any term of Sections 61-1-14.5, 61-1-13(2), 61-1-14(2)(a), (d) and (n), and 61-1-3(1) should not be strictly applied. Nor did the State suggest that it had the burden of isproving exceptions to the definition of "agent" in either of the arguments it made to the District Court in response to Defendant's motion to dismiss. In fact, the entire records stands as testimony to the fact that the State fully intended to try and convict Arnold Swenson on a legal theory of burden of proof which it now argues is absolutely wrong.

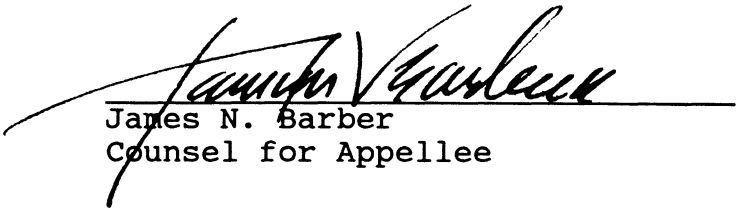
The series of statutes at issue in this case needs to be

amended. There is every expectation that if this Court affirms Judge Frederick's dismissal the Legislature will act. However, if the Court reverses the District Court and allows this case to be tried under the existing law, the Legislature may fail to act; and other citizens may be charged and tried under a statutory scheme which is unconstitutional.

CONCLUSION

For the reasons set forth above, Appellee prays the Court to affirm the decision of the trial court to dismiss the information herein.

Dated this 4th day of November, 1991.



James N. Barber
Counsel for Appellee

CERTIFICATE OF DELIVERY

I certify I delivered four true and correct copies of the foregoing to David N. Sonnenreich, Assistant Attorney General, at 115 State Capitol, Salt Lake City, Utah 84114, this 6th day of November, 1991.

Diana Proud